No. 88-790; No. 88-805; Nos. 88-1125, 88-1309.

IN THE

Supreme Court of the United States

October Term, 1989

BERNARD J. TURNOCK, M.D., M.P.H., Director of the Illinois Department of Public Health, et al.,

Appellants,

v.

RICHARD M. RAGSDALE, M.D., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, an Ohio Corporation, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JANE HODGSON, M.D., et al.,

Appellants,

v.

STATE OF MINNESOTA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, B'NAI B'RITH WOMEN, CATHOLICS FOR A FREE CHOICE, AND WOMEN'S AMERICAN ORT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN NOS. 88-790 AND 88-805 AND APPELLANTS IN NOS. 88-1125 AND 88-1309

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QUESTIONS PRESENTED

1. Do the Illinois, Minnesota and Ohio statutes at issue violate the establishment clause by endorsing one religious theory of when life begins?

2. Do the Illinois, Minnesota and Ohio statutes at issue impose an impermissible burden on a woman's free exercise of religion by restricting her fundamental religious interest in deciding whether to continue a pregnancy?

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

This consolidated Brief *Amici Curiae* is submitted in support of appellees Richard M. Ragsdale and Akron Center for Reproductive Health, and appellant Jane Hodgson.

The Anti-Defamation League of B'nai B'rith ("ADL") is a national Jewish human relations organization dedicated to principles of religious and individual liberty including the right to privacy. ADL views abortion as an issue of personal and religious freedom. Accordingly, it believes that a woman's decision to have an abortion is constitutionally protected, with due regard for the right of women to exercise freely their own religious beliefs and not be constrained by the religious beliefs of others which have been given the sanction of state law. ADL recognizes that various religious faiths and denominations hold divergent views about abortion. In light of this multiplicity of views, ADL believes that no single religious group's beliefs should be legislatively established. Rather, individuals should be permitted broad latitude in deciding for themselves, in accordance with their own religious and moral convictions, whether to continue a pregnancy to term. Thus, ADL views most forms of government interference with an individual's exercise of religious conscience on the question of procreative choice, before viability, including those here at issue, to be unconstitutional under the First and Fourteenth Amendments. For these reasons, ADL supports the principles established in *Roe v. Wade*, 410 U.S. 113 (1973), and opposes erosion of the fundamental rights secured by that decision. ADL believes the Minnesota and Ohio parental notification requirements and Illinois' licensing scheme violate constitutionally protected principles of privacy, free exercise and establishment.

ADL has previously filed briefs in this Court in numerous cases dealing with First and Fourteenth Amendment principles, including *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086

(1989); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Thus, the Anti-Defamation League is able to bring its special expertise relating to religious liberty and its experience advocating religious freedom to the issues raised on these appeals.

B'nai B'rith Women is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from restricting religious freedom, and as women BBW members have particular concerns about preserving their rights. Basic to the rights of every woman is that of deciding when and whether to have children, and so BBW firmly supports upholding these rights as outlined in *Roe v. Wade*.

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic *Declaration on Religious Liberty* (Vatican II *Dignitatis Humanae* 7, December 1965) which declares:

> [T]he civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens.

Women's American ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of the rights articulated in *Roe v. Wade* will be corrosive to fundamental individual liberties. Women's American ORT, and its 145,000 members, believe that when and whether to bear a child is a woman's private decision and opposes attempts to narrow the opportunity for women to control their own lives and be free from all levels of governmental intervention.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by the appellees in *Turnock v. Ragsdale*, No. 88-790 and *State of Ohio v. Akron Center for Reproductive Health*, No. 88-805, and by appellants in *Hodgson v. State of Minnesota*, Nos. 88-1125 and 88-1309.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to continue a pregnancy to term. The doctrine of *Roe v. Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). *Roe v. Wade* and its progeny effectuate the constitutional guarantee that in making critical, private decisions, a woman must be permitted to exercise her personal and religious conscience without state interference.

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), does not, by its terms, overrule *Roe v. Wade*. However, as Justice O'Connor expressly noted in her concurring opinion, and as the plurality indicated, while the Court deliberately chose not to overrule *Roe*, the various opinions are clearly an effort to reexamine its constitutional validity. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring). Moreover, by upholding the state statute challenged in *Webster*, this Court has dangerously narrowed the principles set forth in *Roe v. Wade*. Further, the various opinions have created uncertainty as to the appropriate standard of review.

Amici believe that the Court's decision in the three cases before it today will determine whether the constitutional guarantees recognized in *Roe v. Wade* will retain any vitality. As this Court has recognized, most recently in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Constitution requires the Court to apply a strict scrutiny analysis to all cases impinging on First Amendment rights. Under this principle, the statutes at issue are unconstitutional under both the establishment and free exercise clauses.

These statutes place significant and direct burdens upon the exercise of the right to have an abortion and directly contravene the principles of *Roe v. Wade*. The Illinois statutory and regulatory scheme sets forth complex and oppressive regulations for the operation of private clinics in which abortions may be performed, and effectively regulates such clinics out of business. Parental notification statutes, such as the Minnesota and Ohio statutes, are designed to frustrate the decision to terminate a pregnancy and cause teenagers to delay abortions. This statutorily-imposed postponement of the abortion decision until a later, more dangerous time, and the concomitant creation of greater emotional turmoil and stress, impermissibly burden the right to choose whether to terminate or continue a pregnancy.

Although the protections in *Roe v. Wade* are grounded in the constitutionally-based right of privacy, the 7 to 2 majority in *Roe* recognized the religious nature of the abortion decision. *See Roe*, 410 U.S. at 150. More recently, Justice Stevens acknowledged the religious component in *Webster*, when he argued that the establishment clause of the First Amendment is also implicated by any state-imposed burden upon a woman's right to make, and implement, her own choice with respect to the termination of a pregnancy. 109 S. Ct. at 3081-82 (Stevens, J., concurring in part and dissenting in part). Any erosion of the principles articulated in *Roe v. Wade* damages not only the privacy interests at stake but also implicates religious freedoms.

Clearly, a woman's religious beliefs often play a major role in shaping her views about abortion. The religious component of the decision—and of the debate surrounding whether abortion should be allowed or not—is attested to by the fact that 67 religious organizations submitted their views as *amici curiae* in *Webster*. When a state creates significant obstacles to abortion, it effectively establishes one view on abortion, and unduly burdens the free exercise of religious conscience by those holding other views. The First Amendment does not permit such an establishment or tolerate such undue burdens absent a compelling state interest; in the conflict between dictates of law and dictates of conscience, freedom to pursue religious practice must prevail. As *Amici* will demonstrate below, freedom of religion is predicated on protecting matters of

individual conscience such as whether or not to terminate a pregnancy.

In Section I of this brief, *Amici* establish the religious nature of the abortion decision and demonstrate the multiplicity of religious views on abortion. Section II demonstrates that the Illinois, Ohio and Minnesota statutes promote a particular religious view, without advancing an articulable secular purpose, thus violating the establishment clause. Section III argues that these statutes also violate the free exercise clause because they cut deeply into fundamental religious rights, while failing to advance any of the interests they were purportedly designed to serve. For these and other reasons, these statutes are unconstitutional.[1]

ARGUMENT

I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE

The decision to terminate a pregnancy is profoundly personal. An unwanted pregnancy affects every aspect of a woman's life, from her physical health and emotional well-being to her social relationships and economic standing. Moreover, the physical burdens imposed by pregnancy may also affect a woman's ability to provide emotional and financial care to her family. Accordingly, a woman's abortion decision must be guided by her unique personal circumstances, and not by the government. *See* S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984); Cates, *Legal Abortion: The Public Health Record*, 25 Science 1587, 1589 (1982).

For many women, religious beliefs pervade the decision whether to continue or terminate a pregnancy. When life begins is a theological question—a matter of belief and personal conviction. As this Court recognized in *Roe*,

[1]*Amici* are aware that both the parties and certain other *amici* briefs filed on the same side develop the privacy analysis at great length, and therefore *Amici* note their support for the position taken in those briefs. *Amici* submits this brief limited to a discussion of an issue about which it has special expertise and interest—the impact of the Court's decision in these three cases on freedom of religion.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159. No uniform theological view exists on the question of when human life begins or on the morality of abortion. Indeed, "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." *Webster*, 109 S. Ct. at 3085 (Stevens, J., concurring in part and dissenting in part). In the United States alone, there are over 200 religious groups and denominations, a majority of whom have a position on the morality of abortion. *See* C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984).

The Anti-Defamation League, B'nai B'rith Women and Women's American ORT, whose constituents represent different religious views on the issue of abortion, bring a personal interest and knowledge about Jewish positions on this issue to the debate. According to Jewish law, the fetus is not considered a human being and has no juridical personality until after its birth. For this reason, many Jews do not equate abortion with murder. Indeed, in certain circumstances, Jewish law views abortion not only as a permissible choice for a woman, but also as her religious and moral duty. *See* H. Donin, *To Be A Jew: A Guide to Jewish Observance in Contemporary Life* 140-141 (1972) ("[a]ll halakhic scholars agree that therapeutic abortions—namely, abortions performed in order to preserve the life of the mother— are not only permissible but mandatory."); D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception And Abortion* 284 (1968) ("therapeutic abortion. . . is mandated by the Mishnah. . ."). [2]

Beyond this general consensus, however, different branches of Judaism, and different groups within each branch, disagree about the legal and moral status of abortion and about the specific circumstances under which it is permitted or required. Within the different

[2]The *Mishnah* is a compilation of oral Jewish law collected about A.D. 200 into a work known as the *Talmud*.

strands of Orthodox Judaism, for example, debate persists about the permissibility of therapeutic abortions in situations deleterious to the health of the mother, but not life-threatening, and in situations where there is a grave risk to her mental health. *Id.* at 284-294.

Most Orthodox Jewish groups have traditionally opposed abortion except in pressing situations, such as the endangerment of the mother's life. *Id.* at 275-283. Still other Orthodox Jews emphasize the physical and mental health of the woman as the paramount concern. "[T]he woman's pain 'comes first'. . . considered ahead of the husband's interest in his future child *and* ahead of the potential life of the child itself." *Id.* at 291 (emphasis in original). These groups believe that "insanity constitutes a danger to life and accordingly permit[ ] an abortion when it is feared that the mother may otherwise become mentally deranged." J.D. Bleich, *Contemporary Halakhic Problems* 363 (1977). Further, they counsel that an abnormal fetus may constitute "a grave necessity" in certain instances which would mandate an abortion (for example, if the possible abnormality of the fetus causes great mental anguish to the mother). *Id.* at 367. Finally, such Orthodox groups permit abortion when the pregnancy is the result of rape. D. Feldman, *supra*, at 287.

The Conservative, Reform and Reconstructionist branches of Judaism view abortion differently from many of their Orthodox counterparts and from each other. These branches sanction a woman's decision to terminate a pregnancy and endorse the holding of *Roe v. Wade*. Rabbi Balfour Brickner, Senior Rabbi of the Stephen Wise Free Synagogue and former director of the New York Federation of Reform Synagogues, notes that Reform Jewish thought is in accord with *Roe v. Wade*'s holding that: "The Constitution does not define 'person' in so many words. The use of the word is such that it has application only post-natally." *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 335 (March 24, 1976) (Rabbi Brickner, statement on behalf of the Religious Coalition for Abortion Rights) (citing *Roe v. Wade*, 410 U.S. at 157).

Similarly, the official Conservative Jewish position paper, recently issued, endorses the *Roe v. Wade* guarantees:

> Conservative Judaism continues to affirm its strong support for the 1973 Supreme Court decision of *Roe v. Wade*. Any weakening, limitation, or withdrawal of the *Roe v. Wade* decision is sure to produce tragic consequences. In light of the recent Supreme Court decision, we must be diligent in our efforts to safeguard and preserve the full personal and religious freedom given to the American people.

A Statement On Abortion (issued by the Social Justice Committee of the Rabbinical Assembly) (July, 1989).

Even among these Jewish groups, however, there is disagreement on the rationale for upholding a woman's right to terminate a pregnancy. Under certain circumstances, such as when a pregnancy threatens a woman's life, as the Orthodox view counsels, or where necessary to preserve a woman's health, Jewish law may compel termination of a pregnancy. *See McRae v. Califano*, 491 F. Supp. 630, 696 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (citing testimony of Rabbi David Feldman). Others would protect a woman's right to choose an abortion as the exercise of her own religious and moral convictions. See M.D. Bial, *Liberal Judaism At Home; The Practices Of Modern Reform Judaism* 13 (1971).

Many Reform Jews base their support of a woman's right to have an abortion before a fetus is viable on the belief that a woman should have control over her body. *Id.* at 13. Others stress a woman's physical, psychological and emotional well-being in support of her right to choose an abortion. *Id.* at 12-13. Finally, some view abortion as necessary to safeguard the right of a couple to produce only that number of children for whom they can properly provide. *See* Statement of Rabbi Brickner, *supra*, at 337.

Like the Jewish community, Christians have diverse and often sharply opposing views on abortion. Thus, for example, among the Baptist churches, there is no distinct moral or theological view on the subject of abortion. Denominational pronouncements reflect the views and guidance of elected representatives, but are not considered binding positions. Some authorities within the Baptist Church support liberty of conscience and the exercise of individual moral judgment, and advocate a public policy which guarantees the right of each woman to make her own decision with respect to abortion.

See McRae v. Califano, 491 F. Supp. at 697 (citing statement of Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs). However, the Southern Baptist Convention opposes "abortion on demand," and advocates legislative restrictions on abortion. *Id.* at 699 (citing 1976 and 1977 Resolutions of the Southern Baptist Convention).

The Episcopal Church, USA has consistently supported a woman's right to choose abortion and maintain control over her body. At its 1988 General Convention, the Church declared support for the " 'termination of pregancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that one child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest'. . . . Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office of the Presiding Bishop and the Executive Council of the General Convention, the Episcopal Church Center (March 6, 1989).

The General Synod of the United Church of Christ supports the legality of abortion, in recognition that "life is less than perfect and the choices that people have to make are difficult." United Church of Christ, *Abortion: A Resolution Of The 12th General Synod Of The United Church Of Christ* (Public Policy Pamphlet 12GS-12) (1979). The United Church of Christ thus sanctions a woman's right to consider abortion as an expression of her personal conscience, stressing only that she "act faithfully" when making such a decision. *Id.* In 1971, the Church sanctioned the weighing of such considerations as the "welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population" when deciding whether to bear a child. *Freedom Of Choice Concerning Abortion* (adopted by the General Synod of the United Church of Christ) (June, 1971).

Other religious denominations respect a woman's right to choose precisely because of the diversity of views held by their members. For example, in its policy statement, the Presbyterian Church noted that it "exists within a very pluralistic environment. [The Church's] own members hold a variety of views. It is exactly that plurality of beliefs that leads us to the conviction that the decision regarding

abortion must remain with the individual, to be made on the basis of conscience and personal religious principle free from governmental interference." *Covenant And Creation: Theological Reflections On Contraception And Abortion* at 51 (adopted by the 195th General Assembly of the Presbyterian Church) (1983).

Canonical and theological history establishes that no unanimous tradition on the question exists within the Catholic Church. *See* Maguire, *The Catholic Legacy And Abortion*, 114 Commonweal 657 (1981). Furthermore, as *Amicus* Catholics for a Free Choice poignantly demonstrate, committed Catholics do not all agree on the subject of abortion. *See also* Brief *Amicus Curiae* of Catholics For A Free Choice, *Webster v. Reproductive Health Services*. Many Catholics view the abortion decision as one which must be evaluated by the individual with reference to theology, church tradition and individual prayer. *Id.* at 27.

The current official doctrine of the Roman Catholic Church sharply conflicts with that of many Jewish groups and Protestant denominations. *The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974*, the current text on the teachings of the Roman Catholic Church, states that life begins at fertilization, and that abortion is immoral, although it does not take a position on the commencement of moral or legal personhood.

By passing legislation which restricts the rights of women to choose whether to continue their pregnancies, Illinois, Minnesota and Ohio have intruded into an area where the First Amendment's protection of religious freedom requires that women be allowed to follow the dictates of their individual consciences. These states have made it impossible for women to decide, in keeping with their sincere religious beliefs about when life begins and when termination of a pregnancy is appropriate, whether to have an abortion or continue a pregnancy. Abortion must remain a legal option for women so that they are free to consult their own conscience and beliefs in making a choice.

The establishment clause and the free exercise clause of the First Amendment require government neutrality and reasonable accommodation in the face of competing religious claims. These constitu-

tional principles simply do not allow states to set conditions for the termination of a pregnancy which effectively burden a woman's freedom of choice in such a way as to require her to follow the religious doctrine of a particular sect or sects and conform her conduct accordingly, even though she holds no such religious beliefs. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Requires Government Neutrality Concerning Religion

The First Amendment's establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Last term, this Court reaffirmed that "government may not promote or affiliate itself with any religious doctrine or organization." *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086, 3099 (1989).

The Court has established a three-prong test to determine whether a statute violates the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted).

The *Lemon* test was further refined in *Allegheny*, 109 S. Ct. at 3101, where the Court described the establishment clause protection as follows:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A law will not pass constitutional muster if the purported secular purpose is a "sham". *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). Thus, the "mere existence of some secular purpose" is not enough. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The stated purpose must be "sincere." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring).

As *Amici* argue below, while the purported purpose behind legislation restricting a woman's choice whether to continue her pregancy to term may be secular (*e.g.*, family harmony, protection of a woman's health), closer inspection reveals that these statutes are in fact animated by the religious beliefs of the legislators as to when life begins and when abortions should be permissible under their theological scheme. Although the majority in *Webster* did not address this First Amendment component of the attack on the Missouri statute, Justice Stevens faced this issue directly, concluding that the Missouri statute was an unconstitutional endorsement of one religious theory of when life begins. *Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

As this Court continues to review statutes which restrict women's right to choose whether to carry a pregnancy to term, the concerns raised by Justice Stevens in *Webster* arise with renewed urgency. Indeed, if the Illinois, Minnesota and Ohio statutes are permitted to stand, especially when coupled with *Webster*, the cumulative effect would be a serious erosion of establishment clause principles. As Justice Blackmun emphasized, writing for the Court in *Allegheny*, "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference'. . . in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause." 109 S. Ct. at 3109 (citations omitted).

B. The Statutes At Issue Establish Religion

The Illinois, Ohio and Minnesota statutes violate the establishment clause in several ways. First, they fail to serve or further the purportedly secular purposes identified by the states. Rather, they promote the religious view that life begins at conception, and are a thinly-veiled attempt to block access to abortion. "That fact alone compels a conclusion that the statute[s] violate[ ] the Establishment

Clause." *Webster*, 109 S. Ct. at 3082-83 (Stevens, J., concurring in part and dissenting in part), citing *Wallace v. Jaffree*, 472 U.S. at 56.

Illinois has argued that its rigid regulation of outpatient abortion clinics has a medical purpose—the protection of women's health. *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1230 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988). The record is to the contrary: Illinois was unable to present any evidence that the particular regulations at issue here were enacted to further that purported purpose. *Ragsdale*, 625 F. Supp. at 1230. In fact, the legislative history demonstrates the legislators' concern with the status of the fetus—a religious concept—and not the health of the woman or the safety of the clinics. The Illinois General Assembly intended to obstruct women's access to abortions when it created the challenged statutory scheme in 1973. *See Ragsdale*, P. Jt. App. at A4-A5[3] ("We must make the best of a very sorry situation by at least regulating that procedure so that the Abortion Mills will not proliferate") (statement of Rep. Hyde). This underlying impermissible purpose has been very successfully served by the Illinois statute—many private clinics have had to close since the statute went into effect, and there are vast areas of the state where there are no facilities available to women seeking to terminate a pregnancy. *Ragsdale*, 625 F. Supp. at 1227.

After reviewing the legislative history, the Illinois district court found that the regulatory scheme did not advance the purported secular legislative purpose. *Id.* (defendants failed to produce "any evidence at all" that the "statutes and regulations are medically necessary"). Indeed, the Seventh Circuit found that the Illinois legislature made the regulations at issue applicable to all clinics rather than clinics that perform abortions alone in "an effort to save the statute from unconstitutionality." *Ragsdale*, 841 F.2d at 1369.

The lack of any plausible secular explanation for the intrusive regulatory scheme and the legislators' focus on the nature of the fetus and not on the well-being and health of the woman involved demonstrates that the Illinois statute was intended to endorse the

[3]The proceedings of the Illinois House of Representatives General Assembly are included in plaintiffs' joint appendix.

sectarian position that life begins at conception. The establishment clause does not allow government to mandate one religious view. *See Allegheny*, 109 S. Ct. at 3104-05.

Minnesota's and Ohio's parental notification statutes similarly impose one religious view about abortion on their citizens. Both Minnesota and Ohio have argued, like Illinois, that the statutes have a valid secular purpose—the protection of the well-being of minors by encouraging them to discuss the abortion decision with their parents. *Hodgson v. State of Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988). *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). A careful analysis of the legislative history, however, leads to the inescapable conclusion that the states were actually motivated by a non-secular purpose—preventing minors from having abortions in order to further the legislators' beliefs about when life begins. *Hodgson; Akron*.

The Minnesota legislators made little attempt to disguise the fact that they were motivated by their belief that life begins at the moment of conception and abortions should be strongly discouraged if not outlawed. *Hodgson*. Influential supporters of the legislation said they hoped, by encouraging minors to continue their pregnancies, to "save lives." *Id.* The Minnesota trial court found that the Minnesota legislature was motivated by "a desire to deter and dissuade minors from choosing to terminate their pregnancies." *Id.* Significantly, although the Eighth Circuit reversed the legal conclusions of the district court with regard to the constitutionality of the parental notice provision, the appellate court did not contradict the factual finding that the legislators were motivated by improper religiously-based purposes.

Both the district court and the Sixth Circuit apparently accepted, at face value, Ohio's assertion that the statute's purpose was to facilitate parental involvement in child rearing. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1130-1131, *aff'd*, 854 F.2d at 863. However, as the above discussion of *Hodgson* and *Ragsdale* indicates, it is probable that at least some of the legislators were seeking to advance their religious view of when life begins, an impermissible government purpose. Both the district and appellate

courts *did* conclude that Ohio could not present any legitimate state interest behind its onerous bypass procedures, *Akron v. Rosen*, 633 F. Supp at 1137; *Akron v. Slaby*, 854 F.2d at 863, presumably because the only reason for such a cumbersome process was to make it more difficult for minors to terminate their pregnancies.

Because the Illinois, Minnesota and Ohio statutes do not advance the interests they purportedly were designed to serve, the only plausible reason for such legislation is to further the belief that life begins at conception. Of course, this non-secular belief, unsupported by medical knowledge, may not be established by state law. *See Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). *See also Aguillard v. Edwards*, 107 S. Ct. 2573, 2582 (1987) ("The Legislative history documents that the [creation science] Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine . . . ."); *Wallace v. Jaffree*, 472 U.S. at 57-61.

The challenged statutes also fail under the 'effect' prong of the *Lemon* test. The Illinois regulatory scheme, which imposes onerous regulations unrelated to health concerns, *Ragsdale*, 625 F. Supp. at 1230, has a perceived and actual effect of advancing the non-secular aims of certain religions. The regulations essentially endorse the religious belief that life begins at conception, to the detriment of those who do not share it. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) ("[t]he State must confine itself to secular objectives, and neither advance nor impede religious activity").

The Ohio and Minnesota statutes fail under the second prong of the *Lemon* test as well. While Minnesota had asserted that its parental notice statute sought to encourage intra-family communication, no witnesses involved in the statute's implementation testified that the statute had a beneficial effect on the minors whom it was presumably intended to assist. *Hodgson*, 648 F. Supp. at 775. What the requirements of parental notification or judicial permission have done is to tell teenage girls that the state endorses the religious view that abortions are wrong. The placement of burdensome barriers, *see, e.g., Akron v. Rosen*, 633 F. Supp. at 1137; *Hodgson*, 648 F. Supp. at 764, in the way of young women seeking abortions conveys

the unmistakable message that abortion must be discouraged. This "symbolic union of church and state" cannot be allowed to stand. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127 (1982).

In each case, the statute's message that abortion is wrong promotes "one religion or religious theory against another or even against the militant opposite" in contravention of the First Amendment. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). A woman from either Minnesota, Ohio or Illinois whose sincere religious beliefs have led her to decide to terminate a pregnancy has been ostracized by her state government and given an unmistakable message—not only does the state believe abortions are morally reprehensible, but also that the State will prevent her from acting on her religious beliefs. As this Court held last term in *Allegheny*, such favoritism is unconstitutional. 109 S. Ct. at 3101.

The three state statutes also violate the entanglement prong of the *Lemon* test, and will lead to the kind of religious and political divisiveness condemned by this Court in *Engel v. Vitale*, 370 U.S. 421, 436 (1962). State enforcement of restrictions on abortions, whether relating to the availablity of clinics (Illinois) or the requirement of parental notice (Minnesota and Ohio), put state governments in the position of aiding those religions and religious groups which believe abortion is wrong, to the detriment of those who believe decisions about terminating a pregnancy should be left to individual choice. As the weeks since this Court issued its *Webster* opinion have demonstrated, the tension between these two approaches has become a major political issue at the state and local level. There will be no end to the political controversy, and to the involvement of various religious groups in that controversy, unless this Court properly places a barrier between government and the individual choice to decide whether to continue a pregnancy.

Permitting the state to communicate the religious message that abortion is morally reprehensible flouts the guarantees of the establishment clause. The First Amendment prohibits the fusion of government and religion which occurs whenever government endorses or supports the theological tenets of one religion or several, over others. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. at 389 (when

the government "conveys a message of governmental endorsement or approval of religion, a core purpose of the establishment clause is violated"). *See also Everson*. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of government and religious functions or a concert of dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School Dist. of Abington v. Schempp, 374 U.S. 203 at 222. *See also Allegheny*, 109 S. Ct. at 3099-3105.

The Illinois, Minnesota and Ohio statutes have placed government "behind the tenets" of some religions, to the detriment of *Amici* and other religious groups. This imposition violates the very core of the establishment clause.

III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMAN'S FREE EXERCISE OF RELIGION

The three statutes before this Court purport to address a variety of state interests, including the mother's health, potential human life, and intra-family communication. As discussed above, these purported purposes merely provide a legislative cover for the real objective of the statutes, which is to impose such burdens on women seeking to terminate pregnancies that they are deterred from doing so. However, it is well established that states may not vindicate even legitimate interests in a manner which unduly infringes upon individuals' free exercise rights. *See School Dist. of Abington v. Schempp*, 374 U.S. at 222. The free exercise clause was designed to prohibit governmental interference with the individual's right to act in accordance with the dictates of her own conscience in matters of religion. *Wallace v. Jaffree*, 472 U.S. at 52. *See also United States v. Ballard*, 322 U.S. 78, 87 (1944).

Nowhere is this principle of government neutrality more important than in the highly controversial and emotional issue of reproductive rights. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *See*

also Eisenstadt v. Baird, 405 U.S. 438 (1972); S. Law, *supra* at 1023. Because, for many women, the abortion decision necessarily implicates a woman's religious beliefs, restrictions on a woman's decision may interfere with the exercise of religious conscience by imposing one view (opposing abortion) and by stifling individual choice.

A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief

In *Roe v. Wade*, the Court held that a woman's right to decide whether to terminate her pregnancy was "fundamental." 410 U.S. 113, 152. *See also Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) ("[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices"). Since *Roe v. Wade* was decided, the Court "repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983). Moreover, as this Court has noted, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

The plurality opinion in *Webster* tries to beg the question by claiming that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . . a 'limited fundamental constitutional right'. . . or a liberty interest protected by the Due Process Clause . . . ." *Webster*, 109 S. Ct. at 3058. However, as the *Webster* dissent correctly points out, the Court's failure to renew its commitment to protecting the fundamental privacy and First Amendment interests at stake has already led to an increasingly hostile and divisive political debate. 109 S. Ct. at 3079 (Blackmun, J., concurring in part and dissenting in part).

Amici urge the Court, in the three cases before it today, to reaffirm a half century of decisions holding that the right to make an individual decision regarding childbearing free from government

coercion—and to the exercise of one's religious beliefs and conscience free from governmental endorsement or disapproval—is a fundamental right. *See Wallace v. Jaffree; Roe v. Wade; Eisenstadt v. Baird*; *Griswold v. Connecticut; Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Amici believe that this fundamental right is grounded in both privacy rights and freedom of religious conscience. State statutes regulating abortion restrict a woman's ability to exercise freely her private religious beliefs. Requiring a woman to conform her actions to the government's view of when life begins is repugnant to the protections of the free exercise clause.

This Court must not allow Illinois, Ohio and Minnesota to prevent women from exercising their religious freedom.

B. Statutes Regulating Abortion Affect Fundamental Religious Interests and Are Subject to Strict Scrutiny

As this Court has repeatedly acknowledged, the government may not burden the free exercise of religion unless it can establish that "an inroad on religious liberty. . . is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). *See also Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Court has further emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (when evaluating free exercise claims, the Court must consider "whether some compelling state interest . . . justifies the substantial infringement of [a] First Amendment right").

This First Amendment standard of review is applicable whether unemployment benefits are at stake, *see Hobbie*, or schooling for children, *see Yoder*, or the right to decide whether to continue a pregnancy, as in *Roe v. Wade*. The plurality decision in *Webster* failed to address the First Amendment component to the rights implicated by the Missouri abortion statute. For this reason, the plurality's suggestion that restrictions on abortion may be evaluated

under a lesser standard of review is unpersuasive. Indeed, the Court itself recently reiterated that statutes which implicate First Amendment rights must be strictly scrutinized. *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (applying the strict scrutiny test to strike down a state court conviction for desecration of the American flag).

Justice O'Connor's effort in *Webster* to respond to the uncertainties of the plurality opinion nevertheless failed to address the First Amendment aspect of the abortion debate. *Webster*, 109 S. Ct. at 3058-64 (O'Connor, J., concurring). It is this constitutional dimension—which only Justice Stevens addressed in his partial concurrence and partial dissent — that requires this Court to apply the very highest standard of review to any statute, including those regulating abortion, which restrict the enjoyment of rights guaranteed by the First Amendment.

Under this standard, as properly applied, only a compelling state interest justifies state infringement on fundamental free exercise rights. *See, e.g., Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 406. In keeping with these cases and consistent with this Court's logic, the statutes at issue must be evaluated under a strict scrutiny standard. *See Thomas*, 450 U.S. at 718; *City of Akron*, 462 U.S. at 427.

As demonstrated below, the instant statutes profoundly burden women's rights to the free exercise of their religious choices about childbearing. Moreover, Illinois, Minnesota and Ohio have failed to demonstrate that the statutes further a compelling state interest.

C. The Challenged Statutes Significantly Burden the Free Exercise of Religion

Illinois, Minnesota and Ohio have burdened women's free exercise rights by making it impossible for them to carry out their religious beliefs regarding a uniquely personal and moral decision. Although a woman in any of these states is still able to decide, on the basis of her personal religious beliefs or convictions, that she wishes to terminate her pregnancy, she may be prevented from implementing her decision. This Court has repeatedly held that state regulations which prevent someone from exercising his or her reli-

gious beliefs, without a compelling state interest, are unconstitutional. *See, e.g., Hobbie; Yoder.*

The Illinois licensing scheme virtually regulates private facilities out of existence, thus making it extremely difficult, if not impossible, for a woman in that state to obtain an abortion. As the district court judge found, "the challenged statutes and regulations do place a very real and a very heavy burden on the right of a woman to decide to terminate her pregnancy. The effect of the statutory and regulatory scheme is to increase the cost of abortions and decrease their availability." *Ragsdale*, 625 F. Supp. at 1227. Thus, the clear effect of the Illinois statute is to block the ability of Illinois women to obtain abortions. *Id.* at 1227 ("as a result of the scheme . . . the only outpatient abortion facility in northwest Illinois, will close . . . .").[4]

The Minnesota and Ohio statutes also place serious barriers in the way of a woman's access to abortion, requiring a young woman to endure a sometimes insurmountable obstacle course of regulations before she can obtain an abortion.[5] The Ohio statute requires the attending physician personally to notify the parent, which impinges upon the minor's right to privacy, leads to intra-family conflict, and requires violation of the physician/patient privilege. It is also directly in conflict with the holding in *City of Akron*, 462 U.S. at 448, that states may not require physicians personally to obtain informed consent from parents of a minor:

Further, although there is a judicial bypass procedure, its burdensome pleading requirements and standard of proof vitiate any protection the legislature intended to accord young women. This Court has held that a bypass proceeding must assure "anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained . . . ." *Bellotti v. Baird*, 443 U.S. 622, 644

[4]Moreover, since *Webster* appears to allow states to forbid the use of public facilities for abortions, upholding the restrictions on private facilities in the Illinois statute would mean that a state could virtually legislate abortion facilities out of existence.

[5]Amici refer to appellees' briefs in *Ragsdale* and *Akron Center for Reproductive Health* and appellant's brief in *Hodgson* for a fuller explanation of the burdens imposed by the statutes.

(1979). The potential three week wait for a judicial decision in Ohio does not comply with any notion of expediency. By requiring a woman to disclose her name and address, the Ohio statute fails to guarantee a woman's anonymity.

The Minnesota statute provides that a minor seeking an abortion must notify both of her parents and may not thereafter have an abortion for forty-eight hours. This mandatory two parent notification, which does not take into account whether the minor is living with both of her parents (or one or neither), amounts to an "absolute, and possibly arbitrary, veto" deemed unconstitutional in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). As with the Ohio statute, Minnesota's legislation will only promote family strife and subject the minor to additional emotional distress during an already difficult time. *Hodgson*, 648 F. Supp. at 763-64. Minnesota, like Ohio, has a judicial bypass provision which, because of its cumbersome procedures and built-in delays, is also unduly burdensome. *Hodgson*, 648 F. Supp. at 776.

The fact that these two statutes are directed at minors, in whose protection states may have a heightened interest, does not eliminate the constitutional concerns. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 74. Indeed, this Court has recognized minors' First Amendment rights in a number of contexts. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.* 393 U.S. 503, 506 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

Like adult women, many teenage girls have sincere religious beliefs which are protected by the free exercise clause. They face the same difficult choices as mature women in deciding whether to continue a pregnancy and should not have to overcome greater obstacles in effectuating that decision. Any contrary conclusion ignores this Court's recent decision in *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). There, the Court held that minors and adults are equally responsible for their criminal activity and that minors, like adults, can be put to death for murder. The majority held that minors are "mature enough to understand that murdering another human

being is profoundly wrong, and to conform [their] conduct to that most minimal of all civilized standards." *Id.* at 2977. *Amici* do not necessarily endorse the Court's view that the Constitution allows the government to put minors to death. However, if minors can be presumed mature enough to appreciate the consequences of their actions and to be sentenced to death, it surely follows that they are mature enough to make and carry out decisions about procreation.

D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty

Any purportedly permissible state interest claimed by Illinois, Ohio and Minnesota in support of their legislation dissipates upon careful analysis. The purported state interest underlying the Illinois law is the preservation and protection of a patient's health. However, the Seventh Circuit found that: (1) "many of the physical plant requirements . . . have 'no medical justification whatsoever' when applied to first and early second trimester abortions"; and (2) the certificate of need proceeding requirement does not serve any articulable interest. *Ragsdale*, 841 F.2d at 1373-74. The record before this Court in these cases and many others establishes, without contradiction, that the health effects of unwanted pregnancies and delays in securing abortions are devastating. *See* National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancies, and Childbearing* (1987).

The state interest underlying the Minnesota and Ohio statutes is purported to be the fostering of intra-family communication and protection of the well-being of pregnant minors. However, neither of these statutes effectuates the state's interest in maternal health; nor does either further intra-family communication. Indeed, intra-family communication, if poor, is unlikely to be improved by legislatively-mandated communication. Far from protecting minors, the notice/bypass statutes force minors into situations that can only increase their fear and anxiety, causing them to postpone the abortion until a later, more dangerous time. The statutes may also coerce a young woman into continuing a pregnancy against her personal wishes, religious beliefs and best interests, an equally unacceptable alternative.

The district court in *Hodgson* found that the Minnesota statute "fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 648 F. Supp. at 775. Similarly, the Ohio district court found that the Ohio statute overstresses parental interests and thus "misperceives" the permissible interest a notification statute may serve—the protection of minors. *Akron v. Rosen*, 633 F. Supp. at 1137. The Ohio district court found no compelling state interest to justify the burdensome notice/bypass scheme there. *Id.* Moreover, the Sixth Circuit concluded that "the State of Ohio has presented no legitimate justification for imposing its pleading requirement which . . . is a 'procedural trap.'" *Akron v. Slaby* at 862-63. As the lower courts have already determined, these statutes are not even rationally related to the advancement of the purported state interests.

The challenged statutes have been animated by the religious view that abortion is morally wrong and that life begins at conception. They impose that view on women who, as a matter of religious conscience, believe differently. Because these statutes conflict with the rights guaranteed by the First Amendment, they must fall.

Amici concur with the views of an Episcopal priest, who recently said:

> Whether pro-choice or anti-abortion, you do not have the right in this diverse, pluralistic society to force beliefs and opinions on others. There can never be a just law requiring uniformity of behavior on the abortion issue.[6]

Indeed, the First Amendment stands as a bulwark against government-enforced uniformity in exercising and implementing religious convictions.

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[6] *A Priest on Abortion: Women as the Proper Moral Agent*, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1.

CONCLUSION

For the foregoing reasons, the decisions of the Courts of Appeal for the Sixth and Seventh Circuits should be affirmed and the decision of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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